

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.997 OF 2000

IN

SUIT NO.1097 OF 1978

...

Kamla Pribhdas Nebhnani

Indian Inhabitant, residing at Flat

No.20, Merryland, Worli,

Mumbai- 400 018

...Appellant

v/s.

Haren Krishnakumar Mehta

Indian Inhabitant residing at

Ghia Mansion, Carmichael Road,

Mumbai- 400 020

...Respondent

...

Mr.Vicky Singh i/b Salim Malik for the Appellant.

Mr.M.L.Palan i.b M/s.Dhuru & Co. for the Respondent.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 23RD AUGUST, 2007

JUDGMENT:(PER D.K.DESHMUKH, J.)

1. By this Appeal, the Appellant, who is the original Defendant, challenges the judgment and decree dated 11th October, 2000 passed by the learned single Judge of this court.

2. The facts that are material and relevant are that the Respondent filed Civil Suit No.1097 of 1978 in this court claiming a decree of declaration that the agreement dated 1st April, 1978 is valid and subsisting. He also prayed for a decree of specific performance of that agreement. He also prayed for certain incidental reliefs. The agreement dated 1st April, 1978 was an agreement to sell flat No.30, Merryland Co-operative Housing Society Ltd., Worli, Mumbai. According to the Plaintiff, the Defendant had entered into an agreement to sell the suit flat along with the fixtures and furniture for Rs.1,65,000/-. An amount of Rs.10,000/- was paid as earnest money. The balance amount was to be paid at the time of execution of the conveyance and handing over of possession.. By the agreement, it was agreed

that the possession will be handed over on or before 30th April, 1978. It was also recited in the agreement that the Defendant will secure a letter from the Housing Society giving permission to the Defendant to transfer the flat to the Plaintiff. According to averments in the plaint, in the month of April, 1978 the Defendant made an application to the society for permission to transfer the flat to the Plaintiff. According to plaint allegations, the society by letter dated 12th May, 1978 required the Plaintiff to submit an undertaking in the manner stated in the letter. According to the Plaintiff, undertaking was forwarded by the Plaintiff to the society and an amount of Rs.1,174.54 was also paid as transfer fees. The Plaintiff also informed the society by letter dated 23rd May, 1978 not to transfer the flat in the name of any other person. According to the Plaintiff, the Defendant by her advocate's letter dated 23/25th May, 1978 purported to return the amount of Rs.10,000/- and cancel the agreement. According to the Plaintiff, the Plaintiff received a letter from the society dated 2nd June, 1978 informing him that the society has no objection to the Defendant transferring the flat in favour of the Plaintiff. The Plaintiff contended that the

Plaintiff was ready and willing to perform his part of the contract. The Plaintiff, therefore, filed the suit seeking aforesaid reliefs.

3. The Defendant resisted the suit by filing a written statement. According to Defendant, in terms of the agreement dated 1st April, 1978 an application was made to the society for its permission for transfer of the flat in the name of the Plaintiff on 28-4-1978, the society pursuant to that application interviewed the Plaintiff and the society declined to give permission to the Defendant to transfer the flat in favour of the Plaintiff by letter dated 7-5-1978. According to the Defendant, the letter dated 7-5-1978 was a crucial and relevant letter which has been suppressed by the Plaintiff. According to the Defendant, immediately, after receiving the letter dated 7-5-1978 the Defendant offered to refund the amount of Rs.10,000/- to the Plaintiff. She also proposed that she is willing to give possession of the flat to the Plaintiff on his paying her the entire consideration. It was submitted by the Defendant that as despite making an application to the society to reconsider its decision not to grant permission to transfer the flat, the society was not

taking any decision. The Defendant wrote a letter dated 20-5-1978 to the society asking the society to return her application. According to the Defendant, that application was returned by the society on 21-5-1978 and she by letter dated 23-5-1978 terminated the agreement and returned the amount of earnest money. According to the Defendant, the letter dated 2-6-1978 from the society is not relevant, firstly, because that letter has been written after cancellation of the agreement and secondly the letter is conditional. The Defendant also claimed that time is essence of the contract. The Defendant also produced documents in support of her case.

4. On the basis of rival pleadings, the court framed following issues:

I S S U E S

1. Whether Merryland Co.op.Hsg.Society Ltd. is necessary party as alleged in para 2 of the written statement?
2. Whether the plaintiff is entitled to specific

performance of the agreement dated 1-4-1978 on payment of balance purchase price as prayed for?

3. Whether the agreement dated 1-4-1978 Exhibit B to the plaint is valid and subsisting?

4. Whether the agreement dated 1-4-1978 has come to an end as per clause 11 of the agreement and as such the plaintiff has no cause of action as alleged in para 24 of the written statement?

5. Whether earnest money of Rs.10,000/- has been returned and or paid by the defendant to the plaintiff as alleged in para 10 of the written statement?

6. Whether the plaintiff requests for admission as a member of the said cooperative society was turned by the society after the plaintiff had been interviewed by the screening committee of the society and as per society's letter dated 7th May 1978 being Exhibit 3 to the written statement and resulting as the cancellation of the suit agreement?

7. What decree and order?

5. The Plaintiff examined himself as a witness and the Defendant examined herself as a witness. The learned single Judge, thereafter, decided the suit by his judgment dated 11th October, 2000. The learned single Judge recorded all findings in favour of the Plaintiff and held that the Plaintiff is entitled to a decree of specific performance and the learned single Judge passed a decree of specific performance of the agreement dated 1st April, 1978 in favour of the Plaintiff. It is this judgment and decree which is challenged in this Appeal.

6. The learned Counsel appearing for the Appellant submits that the judgment and decree impugned in the Appeal is liable to be set aside because the crucial findings recorded by the learned single Judge suffer from non-application of mind to the material available on record and that the findings are contrary to the material available on record. It was submitted that the finding recorded by the learned single Judge that there is no pleading or evidence led in relation to time being essence of the contract is ex-facia perverse, because not only that there is pleading in the written statement that the time is

essence of the contract, but there is also evidence to that effect. It was contended that the Plaintiff had also admitted in his cross-objection that he was made aware by the Defendant that there is urgency to sell the suit flat. It was further submitted that even assuming that the time was not essence of the contract initially, then also it is clear from the material available on record that time was made essence of the contract by the Defendant by putting the Plaintiff on notice of the same. It was submitted that thus the time was the essence of the contract. Reliance was placed on the judgment of the Supreme Court in the case of Claude-Lila Parulekar v/s. Sakal Papers (2005) 11 SCC 73. It was submitted that the learned single Judge did not appreciate that the principle that the presumption that the time is not the essence of the contract in case of sale of immoveable property is a rebuttable presumption. According to the Defendant, the Defendant by leading evidence had rebutted that presumption. It was next submitted that the Plaintiff was guilty of suppression of material document. He failed to disclose the letter dated 7-5-1978 from the society rejecting the permission for transfer of the flat. It was then submitted that

the learned single Judge committed an error in holding that there was no necessity for the Plaintiff to plead to the oral rejection of the society, since subsequently the society has accepted the Plaintiff as member. It was submitted that the letter of the society granting permission to the transfer of the flat was of no consequence, because it was written after termination of the agreement by the Defendant after withdrawal of her application on 20th May, 1978. It was also contended that even that letter was conditional. It was also contended that the finding of the learned single Judge that the case of the Defendant that the Plaintiff should take back his earnest money or give balance consideration and take possession of the flat is totally different and new case. It is submitted that this case was already pleaded in the written statement and evidence was also led. It is submitted that the learned Counsel also failed in considering the proper criteria for exercise of discretion in granting a decree of specific performance. It was submitted that the learned Judge failed to see that it would be wholly inequitable to order specific performance of the Agreement in view of the substantial price rise in respect of immoveable properties in Mumbai.

7. On the other hand, it is submitted on behalf of the Respondent that the learned single Judge was justified in recording a finding that the time was not of essence of the contract. It is submitted that there was no breach of contract committed by the Plaintiff. It is submitted that the aspect that the society had declined to grant permission for transfer of the flat in favour of the Plaintiff loses its significant, because subsequently the society has granted permission. It is submitted that the Plaintiff had given an undertaking to the society to occupy the flat himself and on the basis of that undertaking the society had agreed to grant permission for transfer of the flat in favour of the Plaintiff. It is submitted that in the letter dated 23rd May, 1978, by which the agreement was cancelled by the Defendant, it was not even alleged that the Plaintiff has committed breach of any of the terms of the agreement. It is submitted that the learned single Judge has rightly recorded a finding that the Plaintiff was always ready and willing to perform his part of the contract and that there was no breach of the contract committed by the Plaintiff. It was submitted that in case of sale of immoveable

property, there is a presumption that time is never the essence of the contract. It is submitted that the learned single Judge has rightly held that as there was no breach of the contract committed by the Plaintiff, the Defendant was not justified in terminating the contract.

8. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that there is no dispute that the agreement was entered into between the parties for sale of suit flat by the Defendant to the Plaintiff for Rs.1,65,000/- by agreement dated 1st April, 1978. Clauses (2) & (3) of that agreement are relevant. They read as under:-

(2) The purchaser shall pay to the vendor the sum of Rs.10,000/- as earnest money on or before the execution of these presents. The balance amount of the purchase price shall be paid by the Purchaser to the Vendor on the Vendor giving possession of the said flat and on transferring the said flat to the name of the purchaser.

(3) The Vendor shall hand over possession of the said flat to the purchaser on or before 30th April, 1978. The Vendor shall get the necessary letter from the said society consenting and giving permission to the Vendor for transfer of the said flat to the name of the purchaser.

. Perusal of the above quoted clauses makes it clear that Rs.10,000/- were paid as earnest money. Balance amount was to be paid at the time of handing over possession of the flat and the possession was to be handed over on transfer of the flat in the name of the purchaser. The possession was to be handed over on or before 30th April, 1978 and before that the Defendant was to secure permission from the society for transfer of the flat in favour of the Plaintiff. Thus, the Defendant securing permission of the society for transfer of flat in favour of the Plaintiff was one of the essential condition of the agreement. On 28th April, 1978 the Defendant made an application to the society for permission to transfer the flat in favour of the Plaintiff. Admittedly, the members of the managing committee of the society interviewed the Plaintiff and the Defendant and on

7th May, 1978 a letter was written by the society to the Defendant where the resolution passed by the managing committee of the society was quoted. The letter reads as under:-

"With reference to your application received on the 28th April, 1978, for transfer of your flat to Mr.Haren K. Mehta. I reproduced below an extract of the Managing Committee resolution for your information.

"The managing committee unanimously resolved to reject the application and inform the parties that as the Purchaser has refused to occupy the flat himself that transfer of the flat cannot be effected by the society."

I, therefore, return the transfer form, share certificate and copy of the agreement."

9. It becomes clear from the above quoted letter that the society declined to give permission to the Defendant to transfer the flat to the Plaintiff and therefore, the transfer form, share certificate and copy of the agreement was returned to the Defendant.

In paragraph 14 of the written statement, the Defendant has stated thus, "Immediately on receipt of the said letter and bringing the facts thereof to the notice of the Plaintiff, the defendant offered back the refund of the earnest money of Rs.10,000/- or in the alternative offered the vacant possession of the said flat along with the furniture etc. to the Plaintiff. But the plaintiff declined to accept both the offers without assigning any reason." It is also claimed that thereafter there was a meeting between the Plaintiff and the Defendant and it was decided to resubmit an application to the society again. From the society a letter dated 13th May, 1978 was received asking the Defendant to submit an undertaking from the Plaintiff. The Defendant, in her examination-in-chief has stated thus" Thereafter society sent me a letter dt.13-5-1978 requiring plaintiff to give undertaking to the society. I showed the said letter to the plaintiff and asked him to comply as fast as possible. I told the plaintiff either to take back his Rs.10,000/- or to give me the balance of consideration, take possession of the flat from me and then deal with the society, and all this within one week to be completed. However, the plaintiff did not do anything within one week, my

ticket to Germany expired and the flat which I had seen was also lost i.e. I could not get hold of the same." The Defendant states that even after making fresh application as there was no response from the society, the Defendant wrote a letter dated 20th May, 1978 to the society asking the society to give her papers back to her and the society on 21-5-1978 handed over the application along with all relevant papers to the Defendant. The Defendant, therefore, by letter dated 23-5-1978 terminated the agreement noting that as the society has refused the grant of permission of transfer of the flat, she is cancelling the agreement. Perusal of the plaint shows that though the Plaintiff has admitted in his evidence that he was aware of the letter dated 7-5-1978 from the society, he has not even mentioned that letter in the plaint. Perusal of the record shows that issue No.6 was to the effect whether the request made by the Defendant for permission to transfer the flat was rejected by the society by letter dated 7-5-1978 and whether by that letter the agreement stood cancelled. The learned single Judge has considered issue No.6 in paragraph 10 of his judgment. The learned single Judge has recorded following findings "Therefore, even though it is a fact that the plaintiff's request

was turned down by the society initially, that can not and did not result in cancellation of the suit agreement because even though earlier cancellation was on 7-5-1978, the society thereafter accepted the plaintiff as its member and obtained indemnify bond against him, and therefore, even if the findings on this issue is partly in the affirmative that the society had rejected the plaintiff's application for membership, agreement does not stand cancelled because of the subsequent decision of the society."

10. In our opinion, this finding suffers from non-application of mind to the material on record. Even according to the finding of the learned single Judge, society declined to grant permission by letter dated 7-5-1978 and the agreement was cancelled by letter dated 23-5-1978 and on record there is no decision of the society taken before 23-5-1978 granting permission to the Defendant to transfer the flat to the Plaintiff. The decision to which the learned single Judge has made reference of the society is dated 2-6-1978 and that decision is taken by the society after an application submitted to the society by the Defendant for permission to transfer the flat to the Plaintiff was taken back and

withdrawn by the Defendant on 20th May, 1978 and that decision of the society was that in case the Defendant is willing to transfer the flat to the Plaintiff, the society will admit him as a member. Therefore, the decision contained in the letter dated 2-6-1973 from the society is not relevant because that decision of the society is after termination of the agreement and after the Defendant withdrew her application submitted to the society.

11. Perusal of the judgment of the learned single Judge shows that while considering the question whether the Defendant was justified in terminating the agreement for the reasons stated in that letter, first question that the learned single Judge has considered is whether the time is essence of the contract. The learned single Judge, in paragraph 11 of his judgment, has observed thus:-

"It is pertinent to note in this regard that no where in the written statement, the defendant alleged that the time was an essence of contract, nor does the agreement show that time was the essence of contract. Merely putting a date for execution of the agreement

does not make the time as an essence of contract. The parties must specifically aver and plead and such stipulation must be therein the agreement itself, and since it is not in the agreement, nor there is any pleading about that, the contention of the defendant can not be accepted that the time is the essence of contract."

Thus, the learned single Judge observed that there is no pleading in the written statement that the time was the essence of the contract. This finding is contrary to the record. Paragraph 38 of the written statement reads as under:-

"The defendant also submits that as per the terms of the said agreement dated 1-4-1978, time was the essence of the contract. The intention of the parties was also to treat time as the essence of the contract. The grant of approval of transfer on the part of the Society was also the essence of contract and a condition precedent."

Thus, perusal of the above quoted paragraph 38 shows that in the written statement, the Defendant had specifically averred that time is essence of the contract. The Defendant in paragraph 2 of her deposition, which is quoted above, has stated that she asked the Plaintiff to complete the transaction within one week as she had to go to Germany. It is further to be seen here that even if the agreement to begin with does not state that the time is essence of the contract, parties can subsequently agree to make time an essence of the contract. The observation of the learned single Judge, referred to above, that such a stipulation should be in the agreement, therefore, in our opinion, is not correct. Even if such stipulation is not in the agreement, the parties either expressly or by their conduct can make time an essence of the contract.

12. Paragraph 15 of the judgment of the learned single Judge reads as under:-

15. Once it is concluded that the time was not essence of the contract and once it is concluded that the society had agreed to

accept the plaintiff as its member by their decision after 13-5-1978 and after having accepting security bond from the plaintiff, then the burden shifts upon the defendant to prove that the plaintiff is not entitled to the relieves claimed.

It is clear from the above paragraph that according to the learned single Judge, the burden to prove that the Plaintiff is not entitled to the reliefs claimed by him shifts to the Defendant, because according to the learned single Judge, time is not essence of the contract and because the society had later on agreed to accept the Plaintiff as member. We have pointed out above that the finding of the learned single Judge that the time is not essence of the contract is an erroneous finding. We have also observed above that the society did not agree to accept the Plaintiff as a member any time before 23-5-1978, the date on which the agreement was terminated. Therefore, the conclusion reached by the learned single Judge that the society had agreed to accept the Plaintiff as a member and therefore the reason given in the termination letter is not correct and also is without any foundation, and therefore, the

observations of the learned single Judge that the burden now shifts to the Defendant is absolutely incorrect. We have found that the Defendant was in a hurry to dispose of her flat, as the permission from the society was not forthcoming she took her papers back on 21-7-1978 and terminated the agreement. There was no question of Defendant committing breach of any terms of the agreement. Securing permission from the society was an essential condition of the agreement, and as that condition could not be complied with, the Defendant was justified in terminating the agreement, and therefore the Plaintiff was not entitled to a decree of specific performance of an agreement. It is also clear from the record that the Plaintiff had suppressed the fact that by letter dated 7-5-1978 the society had declined to grant permission for transfer of the flat and this conduct of the Plaintiff was enough to decline him any relief which was in the discretion of the court. In our opinion, most significant aspect is that the agreement is of the year 1978. Tremendous rise in price of the flats in Mumbai, in our opinion, is relevant consideration while considering the question of grant of decree of specific performance, which is in the discretion of

the court. The learned single Judge has totally ignored that aspect of the matter. In our opinion, considering that the agreement is of the year 1978, that the Plaintiff had paid only Rs.10,000/-, agreed price of the flat was only Rs.1,65,000/-, and that the Defendant was justified in terminating the agreement on 23-5-1978, the Plaintiff was not entitled to a decree of specific performance of the agreement.

13. In the result, therefore, the present appeal succeeds and is allowed. The judgment and decree impugned in the Appeal is set aside. Suit filed by the Plaintiff being Suit No.1097 of 1978 is dismissed. No order as to costs.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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